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Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-999

IN THE

Supreme Court Of The United States

October Term, 1986

UNITED STATES OF AMERICA,
Petitioner

vs.

PHILLIP PARADISE, JR., et al
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF INTERVENORS-RESPONDENTS SUPPORTING THE PETITIONER

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QUESTIONS PRESENTED

I. Whether the one-black-for-one-white promotion quota imposed by the District Court for all ranks within the Alabama Department of Public Safety, including the rank of corporal, is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit upon which this certiorari is based appears in 767 F. 2d 1514 (11th Cir. 1985) and is included in the Petition for a Writ of Certiorari in Appendix A, at pp. 1a-54a. The Order and Memorandum Opinion of the District Court appear at 585 F. Supp. 72 (M.D. Ala. 1983) and is included in the Petition for a Writ of Certiorari in Appendices B and C, at pp. 55a-64a.

GROUNDS OF JURISDICTION OF SUPREME COURT

The judgment of the Court of Appeals was entered on August 12, 1985. On November 5, 1985, Justice Powell extended the time to petition for certiorari to and including December 10, 1985. On July 7, 1986, this Court entered an Order granting the Petition for a Writ of Certiorari as to question three presented by that petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Section 1 of the Fourteenth Amendment to the United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In February of 1972, the District Court entered the first of many orders in this employment discrimination suit originally brought by the NAACP as a class action against the Alabama Department of Public Safety. In that Order, which is reported as *NAACP vs. Allen*, 340 F. Supp. 703 (N.D. Ala. 1972), aff'd 493 F. 2d 614 (5th Cir. 1974), the District Court enjoined the then director of the Alabama Department of Public Safety and the director of the Alabama Personnel Department from engaging in any employment practices, including recruitment, examination, appointment, training, promotion, retention or any other personnel action for the purpose of or with the effect of discriminating against any employee, or actual or potential applicant for employment, on the grounds of race or color. Moreover, the District Court further ordered that one black trooper be hired for each white trooper until approximately 25 per cent of the Alabama State Trooper force was comprised of blacks. Significantly, this Order prohibited discrimination against *any employee* on the grounds of race or color and therefore would not be limited in its application to the protection of the rights of black employees only on the basis of race or color.

From 1972 through 1981, two Consent Decrees were entered. The first was a partial Consent Decree which was approved by the District Court on February 16, 1979. (J.A. pp. 37-45). In this decree, the Alabama Department of Public Safety (hereinafter referred to as the "department") agreed not to engage in any practice or act which discriminated on the basis of race in promoting. The department further agreed to utilize a promotion procedure which was fair to all applicants and which when used either for screening or ranking would have little or no adverse impact upon blacks seeking promotion to corporal and to have as an objective an employment and promotion system that was *racially neutral*.

The department, therefore, agreed to develop for the position of corporal a promotion procedure which would be de-

veloped no later than a year from the execution of this decree. After completing the steps required by the decree involving a promotional procedure for corporal, the department was then to begin validation of promotion procedures for the positions of sergeant, lieutenant, captain, and major. (J.A. p. 41).

The second decree was entered on August 18, 1981. (J.A. pp. 49-54). This Consent Decree was a result of an attempt by the department to have approved a test for promotion to corporal. This decree provided a procedure for the implementation of the department's proposed test for selecting corporals in conformity with the 1979 decree.

In this decree, it was agreed that the list of candidates for corporal promotions would be reviewed to determine whether the selection procedure in use had an adverse impact against blacks in accordance with the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290. If the selection procedure had no adverse impact, selections would be made in rank order from the appropriate register; if the parties agreed or the District Court found that the selection procedure did have an adverse impact, promotion would be made in a manner that did not result in adverse impact for the initial group of promotions or accumulatively during the use of the procedure. If the parties could not agree on the method for making promotions the matter was to be submitted to the Court for resolution. If the parties could not agree upon a procedure to be used after the first administration of any selection procedure and the method of using that procedure, the matter would again be submitted to the Court for resolution. (J.A. pp. 49-54).

On April 7, 1983, Paradise filed a motion to enforce the terms of the previously entered Consent Decrees. Apparently this motion was prompted by the results of a corporal examination which had been given subsequent to the 1981 decree. This examination had been administered to 262 persons, 202 of whom were white and 60 of whom were black. The highest ranked black person based on the selection procedure held the

eightieth place on the list of rankings. In moving for this enforcement, Paradise sought relief whereby there would be the immediate promotion of 18 to 20 employees to the corporal position, depending on need, on a one-to-one basis and for the department to develop and implement a valid promotional procedure for the corporal position within one year and for the positions of sergeant, lieutenant, captain and major within two years.

In April of 1983, the Intervenors filed their Motion to Intervene. By order dated April 18, 1983, the District Court set this motion for submission *without oral argument* and directed the Intervenors to file any brief and any evidentiary materials. The Intervenors submitted affidavits concerning their right to intervene and also filed a motion for an evidentiary hearing or in the alternative a request for oral argument. This motion was denied in part and granted in part in that the Intervenors were allowed the opportunity to be orally heard but not the opportunity for an evidentiary hearing. Further, in this order, the District Court provided that oral argument would be on the same day that the Court would hear argument on Paradise's Motion to Enforce the Consent Decree. The problems and difficulties with the District Court's order disallowing an evidentiary hearing but granting oral argument on both the Motion to Intervene and the Motion to Enforce the Consent Decree on the same day were embodied in a written objection filed by the Intervenors. In that objection, the Intervenors argued that they were prejudiced by not having the opportunity for an evidentiary hearing and having to present oral argument on both motions on the same day. The substance of their objection was that (1) assuming intervention was granted in any manner, the simultaneous setting of the motions totally prevented the Intervenors from challenging the relief sought in Paradise's motion by way of introduction of testimony, expert or otherwise, and further prevented the Intervenors from properly making a record in this case concerning the relief sought (2) in order to properly and adequately respond to Paradise's motion, the Intervenors would need time to conduct discovery and present

whatever testimony they deemed necessary. The timing of the District Court Order resulted in there only being 24 days before the oral argument was scheduled and therefore the Intervenors were prevented and deprived of the opportunity of gathering evidence and conducting discovery, this being the only reliable means, in the event intervention was granted, to respond to Paradise's motion.

On October 28, 1983, some five months after the hearing on the motions described above, the District Court entered two orders. One order granted the Motion to Intervene to the extent that the Intervenors could participate on a prospective basis only and could not challenge previously entered orders, judgments and decrees since intervention, as found by the District Court, was untimely as to these. (J.A. p. 116). The second order entered by the District Court that day found that the department's selection procedure for promotion to corporal, which had been administered in 1981, had an adverse racial impact on blacks and therefore could not be used for promotion purposes. Consequently, the Court ordered the department to file a plan with the Court to promote to corporal, from qualified candidates, at least 15 persons in a manner that would not have an adverse racial impact. (J.A. pp. 117-124). This order was entered on the basis, presumably, of various papers that had been filed by the parties and the oral argument conducted on May 27, 1983. This order was not based on any evidentiary matter, whether that be testimony, documentary evidence or otherwise. Since the Intervenors had objected to the relief sought by Paradise, that is one-for-one promotion, the entry of this order, and the concomitant denial to the Intervenors of the right to conduct discovery or present any evidence, seriously prejudiced their future employment opportunities.

In response to the District Court's Order of October 28, 1983, the department filed a proposed promotion procedure which was objected to by the other parties, the Intervenors specifically objecting to this procedure contending, *inter alia*, that such a procedure amounted to the imposition of promo-

tional quotas in violation of their constitutional rights and because the procedure itself was in compliance with Consent Decrees which the Intervenors claimed were unconstitutional. (J.A. pp. 125-127).

On December 15, 1983, the District Court issued an order and memorandum opinion granting Paradise's Motion to Enforce and the relief requested therein. (J.A. pp. 128-137). It is significant to note that, as reflected by the docket sheet, the District Court issued no order of any nature setting any sort of hearing before this order was entered, meaning once again that the Intervenors were not afforded an opportunity to produce or introduce any evidentiary material before the Court issued its order. As a result, since this order was entered on a record devoid of any evidentiary material, it is unsupported by any evidence at all.

In sum, the December 15, 1983 order imposed mandatory and prohibitory injunctive relief by imposing drastic promotional quotas, to-wit: enjoining the department and the State Personnel Department from failing to promote from December 15, 1983 forward, for each white trooper promoted to a higher rank, one black trooper to the same rank, if there is a black trooper objectively qualified to be promoted to the rank, this promotional quota remaining in effect as to each trooper rank above the entry-level rank until either twenty-five per cent (25%) of the rank is black or the department and the personnel department have developed and implemented a promotion plan for the rank which meets the prior orders and decrees of the Court and all other relevant legal requirements. (It should be noted that on February 6, 1984, eight black and eight white troopers were promoted to corporal pursuant to this order and over the strenuous objection of the Intervenors.)

The United States, the department and the Intervenors appealed to the United States Court of Appeals for the Eleventh Circuit. (J.A. pp. 165-167). On August 12, 1985, the Court of Appeals affirmed the District Court's Order imposing the one-for-one quota. *Paradise v. Prescott,* 767 F. 2d 1514 (11th Cir.

1985) (See Appendix A, pp. 1a to 54a of the Petition for a Writ of Certiorari.)[1]

In erroneously concluding that the Intervenors right to equal protection was not denied by the imposition of quota relief, the Court first noted that there was a long history of discrimination in the department, but mentioned nothing concerning any discrimination regarding *promotions or promotions to corporal.* Unfortunately, the Intervenors were denied the opportunity to present evidence to demonstrate a paucity of such discrimination or to explain any alleged disparities in percentages of blacks and whites in various ranks. In any event, the Court concluded that the relief issued was appropriate to remedy the present effects of past discrimination. (See Appendix A, p. 40a of the Petition for a Writ of Certiorari.)[2]

The Court of Appeals further recognized that the District Court's Order was substantially related to the objective of eradicating the present effects of past discrimination and extended no further than necessary to accomplish the objective of remedying racial imbalances in the upper ranks of the department, agreeing with the District Court's observation that its order was a temporary measure designed only to eliminate racial imbalance. (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) It must be noted that the Court of Ap-

[1]Since the granting of the Petition for Certiorari is limited to whether the promotional quota in question is permissible under the equal protection guarantees of the Fourteenth and Fifth Amendments to the United States Constitution, only the portions of the Court of Appeals opinion dealing with this matter will be discussed.

[2]The Court had previously noted that the District Court did not commit reversible error as it related to the Title VII claims when it refused to hold an evidentiary hearing to determine whether or not the black troopers to be promoted had in fact been discriminated against. (Appendix A — p.35a of the Petition for a Writ of Certiorari.) However, the Court did not consider whether the District Court's failure to hold such an evidentiary hearing was reversible error in the context of the Intervenors Amendment claims which were raised in both their Motion to Intervene and their Complaint in Intervention. Of course, this again demonstrates the incredible difficulty the Intervenors faced when the District Court ordered a hearing on both the Motion to Intervene and the Motion to Enforce on the same day.

peals shares in the error of the District Court in considering the complained of order as a temporary measure only. In 1972, the department was directed to hire one-for-one until the department was twenty-five per cent (25%) black. Some 14 years later, this is now just being accomplished. If it takes 14 years or even a lesser period of time to accomplish a twenty-five per cent (25%) level in the rank of corporal, such a time frame can hardly be designated as temporary. The Intervenors either will be retired or close to retirement by the time this is accomplished and would have to retire without ever realizing their dream of promotion. Therefore, for the same reason, the Court of Appeals statement that white troopers will not be barred by the order for advancement through the ranks is untenable.

Finally, the Court of Appeals held that the District Court's Order did not require the discharge or demotion of a white trooper or the replacement of a white trooper with a black trooper and that the relief extended no further than necessary to ameliorate the present effects of the department's past discrimination. (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) However, there is no evidence at all that was introduced which would justify any finding that the imposition of quotas was necessary to somehow ease the present effects of past discrimination nor can it be stated with certainty that the District Court's Order would not require the replacement of a white trooper with a black trooper. Although because no evidence was allowed to be introduced there is no record, it certainly can be said that black troopers will be promoted over white troopers without affording any consideration to the passed over white troopers background, length of service, work record, etc. The fact that the black trooper will have to be qualified in no way soothes the innocent white trooper passed over for promotion.

SUMMARY OF ARGUMENT

The matters before this Court all emanate from the Consent Decrees entered in 1979 and 1981. These Consent Decrees

serve as "charters" establishing the principles and requirements which must be met before any promotional scheme can be legitimized by the District Court. It was a motion to enforce those decrees which lead to the matters made the basis of this proceeding and those Decrees, as well as the District Court's Order entered in response to the motion, violate the Intervenors right guaranteed by the equal protection clause of the Fourteenth Amendment. This violation is bottomed upon the undeniable premise that the Consent Decrees require promotional quotas and that the District Court Order of December 15, 1983 requires a one-for-one quota in all promotions; the latter not only being based on a silent record but without satisfying the requisite strict scrutiny.

The Intervenors were not a party to the Consent Decrees although those Decrees, because all orders entered in this case result therefrom, substantially affect and determine their right to employment and career opportunity or advancement. The absence of any input, consideration or representation from white troopers within the department who will be affected by quota promotional schemes is a factor that must be considered in evaluating whether subsequent promotional schemes entered pursuant to the Consent Decrees violate their rights guaranteed by the Constitution.

No evidence at all was presented to the District Court which demonstrated a past history of egregious, persuasive or pervasive discrimination as it related to promotion to corporal, which demonstrated that blacks to be benefited by the one-for-one promotion were actual victims of racial discrimination or which demonstrated that the remedial action chosen was warranted, was narrowly tailored to the achievement of the goal or could not be replaced with a less intrusive remedy. As a matter of fact, the Intervenors were denied the right to an evidentiary hearing in an effort to make a record. No where is this made more clear than in the opinion of the Court of Appeals where the following is quoted in f.n. 17:

> ". . . We agree with the District Court's response to intervenors' suggestion that they were unable to respond to

> plaintiffs' motion until the Court had ruled on the motion to intervene: *'haven't you had the file before you? Haven't you had an opportunity to go through it? This is not an evidentiary hearing, you know the motion was filed, and you've read it. I'll hear you on it.'* (Emphasis supplied) (See Appendix A, p. 45a of the Petition for a Writ of Certiorari.)

The initial relief ordered in this case recognized that there was to be no discrimination based on promotion on the basis of race. The resulting Consent Decrees and the order under scrutiny here violate the Intervenors' right to employment based on their race and have the effect of preventing meaningful career advancement or opportunity. It has taken the department 14 years to meet or come close to meeting the twenty-five per cent (25%) quota for black employees ordered by the District Court in 1972. Consequently, by the time it would take to meet the quotas for promotion imposed by the District Court, the Intervenors either will be retired or close to retirement without ever having the opportunity to advance to another rank. That is certainly not temporary. That certainly is not insignificant. It is, unfortunately, a severe impediment and obstacle to their career advancement and expectations. It is regrettable that the Intervenors were not allowed the opportunity to make a record on this subject for this Court's review.

ARGUMENT

I. No Evidentiary Basis Exists for the Relief Imposed

Since this Brief is submitted in support of the United States of America's Petition, the Intervenors would respectfully adopt and incorporate herein by reference, where appropriate, those portions of the United States' brief dealing with the issue of the constitutionality of promotional quotas under the circumstances of this case. This request is made both because these parties position as to this particular argument are identical in this case and because it would seem to further the important interests of judicial time and economy. Nevertheless, the Inter-

venors would, in addition to the foregoing, submit the following as argument.

In *Firefighters v. Stotts,* 467 U.S. 561 (1984), this Court recognized the significance of non-minority employees not being parties when decrees are entered thereby signifying a lack of agreement by them to any of the terms contained in those decrees. In the case of both decrees entered in this litigation, the Intervenors were not parties nor can it be imagined that they would have ever agreed to quotas in promotion. Since the order of the District Court here challenged was the result of a motion to enforce those decrees and since all orders in this case which have been entered concerning promotion since 1979 or which will ever be entered concerning promotion emanate from those decrees, the absence of the Intervenors as parties to those Decrees is a significant factor in determining whether their constitutional rights have been or are being violated. It is significant for two reasons. One is that the decrees allowed a District Court in this case to impose, without evidentiary support, a promotional quota system. Secondly, a fair reading of the decrees reveal that regardless of the fairness or job relatedness of the promotional test given, if the results adversely impact against blacks, the results cannot be used for promotion. As a result, regardless of the circumstances, or the harshness resulting to the Intervenors, they will always be subject to quotas in any promotional scheme.

The plurality in this Court's very recent decision in *Wygant v. Jackson Board of Education,* 476 U.S. ____ (1986), make it clear the obvious need and necessity for evidentiary support, particularized findings and factual determinations in ordering promotional quota relief as remedial action. As stated by Mr. Justice Powell,

> "Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by non-minority employees. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The

> ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program. But unless such determination is made, an appellate court reviewing a challenge to remedial action by non-minority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination."

Wygant v. Jackson Board of Education, 476 U.S. ..... (1986). (Opinion of POWELL, J.) It cannot be gainsaid in this case that there was a complete and total failure of any evidentiary support for the remedial action imposed by the District Court or that any factual determination was made to support the District Court's conclusion that such action was necessary. Accordingly, an appellate court cannot determine whether the race-based action imposed by the District Court was justified and by so doing the Court of Appeals erred.

As noted, the District Court denied the Intervenors the right to an evidentiary hearing and therefore it is obvious there could not be any factual determination, evidentiary support or particularized findings for the remedy imposed. Quite simply, the result was a judgment not supported by any evidence and a judgment not supported by any evidence should not be allowed. Further, the entire analysis by the Court of Appeals is flawed because it was not based upon the kind of record containing the type of findings necessary and appropriate when a challenge is made by non-minority persons to these type employment practices. (See *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986)). Hence, the Court of Appeals only compounded the error already made by the District Court.

In the Memorandum Opinion which accompanied the December 15, 1983 Order, the District Court utilized the number of blacks, regardless of age, in the State of Alabama according to the *1980 Census of Population* to support the requirement that the promotional quotas imposed should remain in effect until twenty-five per cent (25%) of each rank was black. Not only did the District Court fail to allow the introduction of any evidence concerning this matter, the Court totally ignored the possibility that the comparison tool should be limited be-

cause of the special qualifications involved in being a trooper. The importance of such an analysis and the opportunity to present evidence concerning the same is seen in *Hazelwood School District v. United States,* 433 U.S. 299 (1977), wherein this Court held, in a case claiming discrimination against blacks in hiring teachers, that the proper statistical comparison should be between the racial composition of the school district's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market. In applying this rationale to this case, evidence should have been introduced and the Court should have considered the racial composition of the qualified state trooper population in the relevant labor market in making any statistical comparisons. See also *James v. Wallace,* 533 F. 2d 963 (5th Cir. 1976), wherein the Court held that the plaintiffs failed to establish a prima facie case by a statistical comparison of the percentage of the appointment of blacks to State Boards and Commissions to the percentage of blacks in the state's population inasmuch as the required qualifications might be held by a different percentage of black citizens than their numbers in the population, relying upon this Court's case of *Mayor of City of Philadelphia v. Educational Equality League,* 415 U.S. 605 (1974), which recognized that in all cases it cannot be assumed that all citizens are fungible for purposes of determining whether members of a particular class have been unlawfully excluded.

It is clear that there must be some discrimination to justify the imposition of quotas for that promotional quotas are never proper where discrimination in promotion has not been found to exist. As recognized in *Local 28, Sheet Metal Workers' International Association v. EEOC,* 476 U.S. ..... (1986). (Opinion of BRENNAN, J.), race conscious affirmative action is appropriate only where an employer has engaged in persistent or egregious discrimination. In this case, there was absolutely no evidence upon which a finding of discrimination in promotion to corporal can be based. In ordering this relief, the District Court completely ignored the fact that the department had not promoted any persons, minority or otherwise, to

the rank of corporal except as provided by court order since 1979. The parties were never given the opportunity to demonstrate that the alleged discriminatory pattern was not the result of any discrimination. See *Hazelwood School District v. United States,* 433 U.S. 299 (1977).

II. Strict Scrutiny Is Required

It will be of little help to Paradise to argue that such a prerequisite for ordering relief of this type, i.e. strict scrutiny, was only first announced or clearly articulated in *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). As the plurality opinion reveals, many prior cases of this Court have not only admonished district courts but have directed them to make sure that the remedial action fits, that it is specifically tailored to accomplish the intended purpose. There must be a careful analysis of all surrounding circumstances before implementation of numerical relief, *Fullilove v. Klutznick,* 448 U.S. 448 (1980), that is . . . "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Fullilove v. Klutznick,* 448 U.S. 448, 491 (1980). (Opinion of BURGER, C. J.). For as stated by Mr. Justice Stevens, "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Fullilove v. Klutznick,* 448 U.S. 448, 537 (1980) (STEVENS, J., dissenting). Therefore, one cannot say that the Court of Appeals' error can be tolerated because it occurred before this Court's decision in Wygant *supra.*

The plurality opinion in *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986), provides a succinct but yet powerful recognition of the availability and existence of equal protection claims by non-minorities based upon race. It would serve no purpose to merely rehash or recite the opinions cited by this Court but nevertheless the Intervenors rely upon the same in arguing what is obvious: that the Consent Decrees and the District Court's Order of December 15, 1983 operate against

them in favor of blacks and therefore constitute a classification based on race, a classification that must meet the type scrutiny outlined in *Wygant supra* in order not to be in violation of the equal protection clause of the Fourteenth Amendment.

In this regard, it should be noted, although probably more than obvious by now, that the Court of Appeals failed to utilize the proper standard of review in determining whether the promotional quota was constitutional. Instead of determining whether the District Court's Order passed strict scrutiny, that is whether the racial classification was justified by a compelling governmental interest and whether the means chosen to effectuate this interest were narrowly tailored, the Court of Appeals opted for a hybrid formulation gleaned from a trilogy of cases noted in their opinion. (See Appendix A, pp. 36a-39a of the Petition for a Writ of Certiorari.) See also *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.)

The Court of Appeals erred in affirming the District Court's race conscious relief because it was not justified by a compelling governmental interest in that the type evidentiary record required concerning past discrimination in promotions was not made, there was simply no evidentiary support to justify the remedial action or to determine it was necessary. However, the Court of Appeals also erred in affirming the District Court because the remedy was not narrowly tailored to the achievement of the interest to be served, that being the second prong of the strict scrutiny test announced in *Wygant supra,* that formulation being nothing more than a reaffirmation of the existing standards. Using *Wygant supra* as a model, it is not difficult to see why the race conscious relief ordered here was not narrowly tailored.

These innocent Intervenors are being required to share too much of the burden, especially when they have done nothing to prevent blacks from advancing and where blacks who have not been identified as actual victims of discrimination will advance over them. Here, the Intervenors are not faced with the

denial of a future employment opportunity, which can be speculative. Rather, the Intervenors are faced with unfulfilled hopes of promotion based and earned from many previous years of dedicated service. It is only natural for them to expect that many years of service will result in the ultimate reward: promotion. Perhaps the most common fabric in our society is that those who work hard and perform their jobs competently will be rewarded through promotion. The effect of the District Court's Order deprives the Intervenors of this valued expectation and career opportunity. Or as stated by Mr. Justice Powell in *Wygant supra,* . . . "A worker may invest many productive years in one job in one city with the expectation of earning the stability and security of seniority. . . .", *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.) Here, the Intervenors have already invested many productive years in one job with the obvious expectation of earning stability and financial security, not to mention the self-esteem and respect connected with promotion. With promotion comes benefits, not only monetary ones but psychological and emotional ones as well. The District Court's Order deprives the Intervenors of their dreams and expectations.

It is not enough to say that this will only be temporary or in the words of the Court of Appeals . . . "white troopers are not barred by it from advancement through the ranks." . . . . (See Appendix A, p. 41a of the Petition for a Writ of Certiorari.) There is no way of knowing when this promotional quota will be reached. If evidence could have been presented, it would have shown that the Intervenors in all likelihood might either be retired, near retirement or eligible for retirement by the time this goal will be accomplished. If it took 14 years for the department as a whole to reach the hiring quota, then it is not unreasonable to assume that a similar length of time will be needed to achieve the goals imposed by the District Court.

As a result, the burden on the Intervenors is too intrusive in that it imposes upon them the entire burden of achieving racial equality. *Wygant v. Jackson Board of Education,* 476 U.S. ..... (1986). (Opinion of POWELL, J.) It deprives them

of the only opportunity to which they have to look forward: promotion.

There is a less intrusive remedy in this case. Any preferential treatment accorded to nondiscriminatees — or to discriminatees beyond those measures necessary to make them whole — necessarily deprives innocent incumbent employees of their rightful places. Accordingly, as between non-victims of unlawful discrimination and innocent third parties, it cannot be said that the government has a greater interest in helping one individual than refraining from harming another. *Regents of the University of California v. Bakke,* 438 U.S. 265, 308-309 (1978). (Opinion of POWELL, J.) Accordingly, the only remedy that should be imposed would be one that restores proven discriminatees to the position they would have occupied in the absence of discrimination. In this case, innocent whites and nondiscriminated-against blacks should be treated equally in the promotion process. To do otherwise would mean that the relief or remedy is not narrowly tailored to the achievement of the requisite purpose.

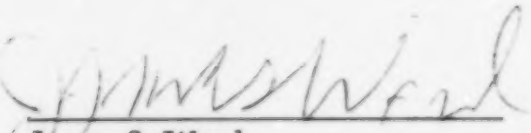
CONCLUSION

The Eleventh Circuit erred in allowing the District Court's race conscious relief to stand. It erred in affirming the District Court in the absence of affording the Intervenors an opportunity for an evidentiary hearing, and in the absence of an appropriate and necessary record containing evidentiary support and particularized findings to justify the relief in question under the appropriate standard of strict scrutiny. To allow the Eleventh Circuit's opinion to stand would mean that District Courts, when faced with constitutional challenges to race conscious remedies by non-minorities, could impose relief almost without limitation or constitutionally sanctioned boundaries. It is not the District Court's function to favor one race over another. It is not the District Court's function to make judgments without the requisite evidentiary support. It is the District Court's function to analyze race conscious relief with strict

scrutiny, and to insure that that test has been met. It was the function of the Eleventh Circuit in this case to insure that the District Court, in imposing the complained of race conscious remedy, applied the appropriate standards and analysis. The Eleventh Circuit failed in its function in that it not only allowed the District Court to escape without utilizing the appropriate scrutiny but it compounded the error by succumbing to the same failure.

As a result of the Court of Appeals affirmance, these innocent Intervenors will have placed before them serious, if not permanent, obstacles and barriers to the one goal to which they can look forward: promotion. On the state of this record, the opportunity for career advancement and promotion should not be taken away from them. The Eleventh Circuit has done so and therefore their decision must be reversed.

Respectfully submitted,



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